IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-762

SAMUEL KRAHAM,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

MOTION TO DISMISS OR AFFIRM

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Appellee, by and through its undersigned attorney, respectfully moves this Court to dismiss this appeal on grounds that no substantial federal question is properly before this Court at this time, in view of the inadequate factual record.

Alternately, Appellee moves this Court to affirm the judgment below on grounds that Section 847.011 Fla. Stat. is constitutional.

The Factual Record

Though Appellant characterizes himself as a "mere" clerk, there is no basis in the record for his implication that he was aught but a knowledgeable dealer in pornographic materials, thus eviscerating any vagueness claim, as in Footnote 5, Mishkin v. New York, 383 U.S. 502 at 507 (1966). If and when this case goes to trial, it will be the State's burden to prove Appellant's guilty knowledge, as required by the statute and Johnson v. State, 351 So.2d 10 (Fla. 1977). Until then, only the facial validity of Section 847.011 Fla. Stat. is in issue.

This Court may technically have jurisdiction of the ruling on facial

validity, but it has consistently refused to exercise it absent a setting against which to weigh the effect on Appellant of the alleged constitutional issue. In Socialist Labor Party v. Gilligan, 406 U.S. 583 at 588 (1972), this Court dismissed an appeal, saying:

> "The long and the short of the matter is that we know very little more about the operation of the Ohio affidavit procedure as a result of this lawsuit than we would if a prospective plaintiff who had never set foot in Ohio had simply picked this section of the Ohio election laws out of the statute books and filed a complaint in the District Court setting forth the allegedly offending provisions and requesting an injunction against their enforcement. These plaintiffs may well meet the technical requirement of standing, and they may be parties to a case or controversy, but their case has not given any particularity to the effect on them of Ohio's affidavit requirement.
>
> "This Court has recognized in the past that even when

> jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in cleancut and concrete form.' Rescue Army v. Municipal Court, 331 U.S. 549, 584, 91 L.Ed. 1666, 1686, 67 S.Ct. 1409 (1947). Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present. Id., at 574, 91 L.Ed. at 1681." at 588

The Florida Supreme Court is firmly committed to the doctrine of construing statutes in such a manner as to save constitutionality. See e.g. State v. Reese, 222 So.2d 732 at 735 (Fla. 1969). Whether any such construction is necessary here which might affect Appellant's case is as yet unknown. Thus, pertinent here is Cardinale v. Louisiana, 394 U.S. 437 at 439 (1969), where this Court rejected an issue raised initially before this Court, noting:

> "* * * Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality.* * *."

The record herein is no better than if the issue had never been raised.

This Court has always placed great reliance on the construction given state statutes by the highest state court, and has been careful to place its constitutional rulings in proper factual perspective. See e.g. Street v. New York, 394 U.S. 576 (1969). Neither is possible here, so this Court should decline review.

The Vagueness Claim and Notice

Facially, 847.011 Fla. Stat. can hardly be too vague. In Rhodes v. State, 283 So.2d 351 (Fla. 1973), the statute was construed to include this Court's definition in Miller v. California, 413 U.S. 15 (1973). In Miller, supra, this Court stated:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

In like manner, the adoption of Miller's standards for Florida eliminates any impermissible need to guess at what conduct is prohibited.

That Appellant relies so heavily on dissenting opinions in the cited obscenity cases demonstrates the absence of a substantial federal question. This Court has upheld statutes like 847.011 Fla. Stat. repeatedly. Though a person may not know for a certainty whether material is in fact obscene before trial, absolute precision has never been required. As elucidated in Footnote 10 of Miller, supra,

> "Many decisions have recognized that these terms of obscenity statutes are not precise. [Footnote omitted.] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .'

> United States v. Petrillo, 332 U.S. 1, 7-8 (91 L.Ed. 1877, 67 S.Ct. 1538). These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries to fairly administer the law . . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . . .' Id., at 7 (91 L.Ed. 1877).

Appellant has no reason to claim lack of notice. The statute has been authoritatively construed not only as to the test of obscenity [Rhodes v. State, supra], but also to the appropriate community [Davison v. State, 288 So.2d 483 (Fla. 1973)], and as to the requirement of scienter

[Johnson v. State, supra]. As thus authoritatively construed, the statute passes muster just as did the New York law approved in Mishkin v. New York, supra.

The Right to Private Possession

The central issue in the Florida courts has been the right to sell to adults who, admittedly under Stanley v. Georgia, 394 U.S. 557 (1969), have the right to private possession. That the protection of Stanley v. Georgia, supra, does not extend anywhere outside the home is most clearly reflected in United States v. Orito, 413 U.S. 139 at 141-143 (1972).

The Florida County Judge was wrong to conclude as he did that the right to possession of obscene materials created a correlative right to sell obscene materials. The Florida Supreme Court correctly

reversed that decision, and this Court should affirm the result.

CONCLUSION

Both because this Court does not yet have a factual setting against which to weigh this case, and because the Florida Supreme Court correctly assessed the facial validity of Section 847.011 Fla. Stat., this Court should either dismiss the instant appeal, or affirm the result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss or Affirm has been furnished to Edna L. Caruso, Esquire, Suite 1007, Forum III, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401, and to Allan L. Hoffman, Esquire, 509 North Dixie Highway, West Palm Beach, Florida 33401, by mail, this day of January, 1979.

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